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ABSTRACT

This article investigates certain modal choices made by law students when writing in an English-as-a-Second-Language (ESL) adjunct class, illustrating areas of concern and instances of successful development of ideas in extracts from first-year undergraduate law students' essays on a problem in tort law. The study compares judgements of teachers regarding the status of claims made in the students' writing and examines effects of the writers' epistemic modal choices upon the consistency and warrant of argumentation in the texts. Findings suggest that inconsistencies in the wording of arguments do not necessarily reflect any underlying intellectual confusion over content or writer's viewpoint. The discussion emphasizes the value of understanding and appreciating students' academic legal writing as it develops in a second language context and suggests that students are likely to become more aware of the need for careful wording as they introduce possibilities into their texts through the experience of reading, and being asked to make written comments upon, the answers of other students. An appendix presents the study's dataset of 30 conclusions to a specific aspect of one legal case. (Contains 16 references.) (NAV)

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Modifying Meanings: Modality and Argumentation in Students' Written Answers to a Legal Problem.

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Abstract

This article investigates certain modal choices made by law students writing in an ESL adjunct class, illustrating areas of concern and instances of successful development of ideas in extracts from students' essays on a problem in tort law. The study compares judgements of teachers regarding the status of claims made in the students' writing, and examines effects of the writers' epistemic modal choices upon the consistency and warrant of argumentation in their texts. While possibilities for teaching are noted, the discussion emphasises the value of understanding and appreciating students' academic legal writing as it develops in a second language context.

Introduction

Although the role of the English language teacher in commenting on students' written work is undoubtedly complex and demanding, it is sometimes excessively problematised in professional discourse on the teaching of writing in English, not least in the case of English as a second language (ESL). Diagnosing and discussing this tendency in the literature, Reid (1994) develops an insightful commentary on what she has come to see as the "myths of appropriation" of the content of students' written discourse by English language teachers. The potential dangers of appropriation of a student's content and message by a well-meaning teacher must be acknowledged, but these risks are easily exaggerated and ought not to inhibit ESL teachers from offering comment as part of what we do. A similar distinction between (helpful) intervention and (intrusive) interference is made by Widdowson (1987). Respect for the student, in short, does not entail an abdication of the writing teacher's role.

One context in which concerns about content appropriation by English language teachers seem peculiarly misplaced is that of the adjunct class in which students write on selected content subjects (Snow and Brinton 1988; Johns 1990). In contexts where our students will eventually receive feedback on the content of their writing from specialist subject lecturers, students may still respect ESL teachers, but are unlikely to be overawed by our authority. When commenting in such contexts on students' writing, ESL teachers can surely adopt a supportive stance that is neither subordinate nor subversive. (We should not cravenly avoid all content in our students' writing, while patiently picking up and reattaching the missing morphemes, in a misguided conception of a "service" role; nor, on the other hand, should we routinely adopt an oppositional posture towards whatever curriculum our students happen to be studying, in a comparably misconceived distortion of a "critical" role.) The ESL teacher in an adjunct class should be ready to speak, in an independent, friendly and informed voice, as one reasonably experienced participant in the complex educational environment and ambience in which ESL students are learning to think, talk and write as members of an evolving academic community. These sentiments, at least, form part of a philosophical and affective backdrop to the more narrowly targeted study of writing, in an adjunct class, by first-year undergraduate students of law that follows in this article.

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A prerequisite for well-informed comment on students' writing in an adjunct class is a willingness on the part of the teacher to become informed about selected areas of the students' subject curricula and so to appreciate the discourse challenges that their students are being asked or expected to take up. In a discussion of adjunct course design that focused on the initial planning phase of an English enhancement course for law students at the University of Hong Kong, Allison, Corcos and Lam (1994) presented a rationale for deriving materials and tasks for that course from a concurrent first-year course in tort law. Their discussion suggested the desirability (and difficulty) of reconciling a coherent course plan, needs for teacher preparation and task design, and a maintenance of enough room for genuine though limited negotiation of content and priorities with students as the course would take place. Arising from the same working context, the present study draws upon experience during the first year of teaching the English Enhancement course for Law (henceforth identified as "EEL").

One obvious change in emphasis as the first EEL course progressed was that, in the light of interests and concerns expressed by students and acknowledged by staff, a focus on the writing of legal problems assumed an unexpectedly overriding importance in the second semester. Even though students were already following a separate course in legal writing within the Law Faculty at HKU, the approaches and emphasis on the two courses were quite distinct. The legal writing course focussed on research techniques and the preparation of term papers, whereas the EEL course came to emphasise the writing of answers to legal problems, with tort law as the immediate domain, including the kind of limited-time writing that students would be required to produce in law examinations (Horowitz 1986).

The present study examines one area of students' academic legal writing, namely the epistemic modal choices available to and used by these writers as they produce answers to legal problems, and looks at some effects of these choices upon the consistency and warrant of the argumentation that appears in the text. The study offers a linguistic perspective upon the development of coherent argumentation in written answers to legal problems. It illustrates areas of concern and instances of successful development of ideas in extracts from students' essays on a problem in tort law. While possibilities for teaching are noted in a number of places, the main emphasis of the article, and its most important implication for teaching, will be on the value of understanding and appreciating students' academic legal writing as it develops in a second language context.

Modality and argumentation

As students explore alternative lines of argument in their written responses to a legal problem, they need to distinguish between possibilities that they want to discuss and points that they choose to put forward as part of their answer. This process calls for a sophisticated command both of the meanings of relevant grammatical and lexical forms and of implications that uses of these forms can carry in contexts of discourse.

"Relevant" linguistic forms, in formal written English, include simple declaratives, typically serving to advance assertions, and a wide range of signals of modality, including certain modal auxiliaries, sentence adverbials and other verbal, adjectival or nominal indicators of possibility or probability. Other pragmatic considerations in text interpretation relate to the different functions that can be served by the same linguistic form, and to roles of context and of previous knowledge, of both content and formal kinds, in understanding how a form has been used in a given instance. Declarative statements, for example, are not invariably used by speakers or writers in English to make assertions. ("You're joking!" is more plausibly used to express incredulity or astonishment than to tell people what they are doing.) Any attempts by student essay writers to use declarative statements without also marking a commitment to the corresponding linguistically encoded assertions are, however, extremely likely to be misunderstood. On the other hand, uses of what may appear formally as non-committal indications of possibility can indicate very effectively the position that a writer holds on an issue.

Modal choices are concerned (inter alia) with the signalling of positions on a scale of probability between the polar opposites of assertion (X is so) and negation (X is not so); see Halliday (1985). Linguistic signals of possibility and probability carry important implications for the consistency of arguments presented in students' essays on legal problems. I include here, as an instance of unmarked epistemic modal choice, the case in which declarative statements are advanced without qualification as categorical assertions (Palmer,

1986:86ff). Referring to the HKU context, Allison (1995) offers further discussion and references concerning assertions and alternatives in students' academic writing.

These brief remarks should not be taken to imply any particular commitment towards the unusually restrictive use in Halliday (1985) of the term "modality" exclusively to denote epistemic meanings of probability and "usuality". (More recent usage in the Hallidayan tradition terms epistemic meanings "modalisation" while giving a more inclusive sense to "modality": Butt et al., 1995.) Irrespective of metalinguistic preferences on the part of authorities in linguistics, we should clearly recognise the importance in legal discourse of the linguistic signalling of those dimensions of obligation and inclination which Halliday calls "modulation", but which Lyons (1977) and Palmer (1986), following von Wright (1951), treat as "deontic modality". These other areas of modal choice, however, are beyond our scope here.

The study

Aims. The aims of the study were:

- to analyse the extent to which first-year undergraduate students, in writing their conclusions on one part of an assigned legal problem, indicated these conclusions as categorical or as tentative;

- to illustrate the features of modal choice exhibited at these points in the students' essays;

- to validate or modify the application of the judgemental categories in the preliminary analysis, in light of attempts by other ESL teachers to apply the same categories to the dataset of conclusions on the legal point at issue; also to determine how far ESL teachers on the same adjunct course (for law students) might interpret the students' conclusions differently from other ESL teachers unfamiliar with the relevant subject area (tort law);

- to examine modal choices and consistency or argumentation across more extended extracts from students' writing, and to relate selected instances of perceived incoherence to linguistic features of the extracts and to possibly intended functions.

Method: - The writing task. The study examines one aspect of students' responses to the following assigned problem in tort law:

> "Albert's wife Betty suddenly became very ill, and so Albert put her in his car and drove her to the hospital. Betty was not wearing a seatbelt. It was 3 a.m. and there was very little traffic around. Albert drove very fast. He came to a set of traffic lights which were red, but he went straight through, saying to himself "I'm sure there is no one coming and I really must get Betty to hospital."
>
> Unfortunately there was a car coming toward the same junction, also being driven fast. This car was driven by Carl who was drunk, and he had a passenger, Doris, who was also very drunk. They were laughing and joking with each other about driving fast and frightening the other people in the road.
>
> The two cars collided. Albert and Carl were not harmed. However, both Betty and Doris suffered personal injuries.
>
> Advise Betty and Doris regarding their claims in tort."

(From Bachelor of Laws First Examination: Law of Tort. April 1994, Department of Law, University of Hong Kong).

- Focus of the study. Of the issues raised by this problem, we shall examine students' discussions of whether "Albert" has breached the duty of care he owed, as a driver, to "Betty" and "Doris". (Names of the potential

plaintiffs and defendants in the question will for the rest of the article be used without scare quotes.) We shall isolate this issue, as did most student writers, from consideration of other issues in the essays, including possible defences in terms of contributory negligence, volenti or ex turpi causa.

- *The writers.* The writers were first-year HKU law students in two classes on the 1994-95 EEL course (12 male and 18 female students).

- *The dataset.* Thirty student essays were obtained in the course of a timed writing assignment in two classes. A total of 45 minutes had been allocated to the writing of an answer to the legal problem. The problem had been assigned one week earlier, and "open-book" conditions obtained as the in-class responses were written.

The dataset consists of 30 conclusions, extracted by the researcher, concerning just one aspect of the legal problem, namely, whether Albert has breached a duty of care owed to Betty and Doris. Conclusions regarding duty to Betty were extracted in most essays, where this aspect of the case was discussed first; in some essays, conclusions were taken where duty to Doris was first discussed, or where both parties were considered together. (The point of law is the same, as a duty of care is owed to both Betty and Doris, and as we exclude questions of defences from consideration.) In most instances, a conclusion on the point at issue could readily be identified. In one case, where the student writer took Carl to be mainly if not solely to blame for the accident, any breach of duty by Albert to other road users can only be inferred (generously) from the student's comments on Albert's possible "contributory negligence". (That term should properly be used, not of a possible defendant in an action, but of a plaintiff who is alleged to be partly responsible for the damage he or she has sustained.) Although a response on the point at issue was identified in all essays, one or two conclusions were markedly non-committal in their choice of wording.

The dataset appears in the appendix. The number order of the scripts reflects the sequence in which they had been placed prior to the category analysis. The element of subjective choice by the researcher in extracting the students' written conclusions on the relevant point was considered unavoidable. This is because it would not be possible to include the full text of 30 essays when reporting the study, nor was it judged reasonable to request colleagues to read 30 full essays for the present research purpose. See, however, findings and discussion, section 2.

The categories for analysis. Preliminary analysis involved placing each extracted response to the issue of whether Albert had breached his duty of care into one of five judgemental categories: categorical "YES" or "NO", qualified "(YES)" or "(NO)", and indeterminate "FENCE". Subsequent mention of these categories will dispense with scare quotes. The FENCE category is potentially ambiguous, between carefully neutral and merely inconclusive responses (and could have been subdivided accordingly if required).

A later refinement, adding two more categories to the initial set, was to subdivide the qualified responses into "probably" (coded as (YES) or (NO) but with more restricted scope than before) and more tentative "possibly" (introducing codes "(YES?)" or "(NO?)" to mark greater uncertainty). This refinement had the advantage of distinguishing some quite markedly different modalities, but the disadvantage of adding two more potentially fuzzy category boundaries to the scheme. One motive for the second stage of the study, therefore, was to discover how effectively a revised set of seven categories might be applied by others.

The judges. The independent readers who applied the set of seven categories in the second stage of the study were all native speakers of English (one Australian, two British and one Canadian). Two were teachers (both males) on the adjunct course (EEL course) while two were other teachers (one male, one female) in the English Centre. Selection was thus evenly balanced across EEL and non-EEL teachers, but was not fully randomised in other respects.

Findings and discussion.

1. The preliminary analysis.

Preliminary analysis was carried out by the researcher. The lack of independent validation of the five judgemental categories used at this stage is not seen as a problem, as the original dataset is itself reported;

readers can thus form their own judgements independently of those of the researcher (and of those of the researcher's colleagues at a later stage). Recall that, at this stage, the categories (YES) and (NO) cover the full range of probable or possible qualified conclusions.

The question at issue was whether, in their conclusions, student writers had found that Albert was or was not in breach of duty to his passenger and the passenger in the other vehicle. A total of 12 responses were classified in the preliminary analysis as categorically YES (5) or NO (7), as in examples (1)-(6) below. (The numbering of examples in this section will follow expository convenience; alongside each example, the number of the essay script in the dataset is shown in square brackets.)

(1) Moreover, it was obvious that both Albert and Carl had breached their duty of care. YES [script 8]
(2) Unequivocally, a breach of duty by Albert could so be proved. YES [script 21]
(3) Albert has therefore breach his duty to both parties. YES [script 14]
(4) So he wasn't in breach of duty. NO [script 2]
(5) To conclude, due to in emergency situation and not likelihood of accident, Albert is not in breach. NO [script 10]
(6) However, Albert did not breach the duty as [REASONS] NO [script 28]

There appear to be dangers in offering a categorical response when an issue calls for careful interpretation in the light of circumstances: this is especially so when possible counter-arguments have been overlooked in a student's essay. Comments by the tort law lecturer, R. Glofcheski, indicated that driving through the traffic lights which were red would afford prima facie evidence that a reasonable standard of care was not maintained, but that a standard of care lower than normal might be accepted by the court as reasonable in view of the emergency described in the fact situation. Whichever way students develop their arguments, qualified conclusions appear preferable here.

The remaining 18 responses exhibited varying degrees of caution. Some of the responses sought to distinguish between (a) Albert's possible breach of the duty of care he owed to Betty and Doris and (b) Albert's demonstrable offence against the law in driving through traffic lights which were red. The latter offence was variously described by student writers as a breach of the traffic ordinance or even presented as a "breach of statutory duty", a speculation that was not reasonably warranted in terms of the question set (R. Glofcheski, spoken communication.)

Modal qualification of their conclusions does not mean that these writers simply sat on a fence. In all cases, the responses either specified or arguably implied the likelihood of one of the two possible outcomes. Later findings and discussion in section 2 will show that (pace Halliday, 1985) explicit markers of writer opinion or of probability do not always pragmatically weaken the assertive force of a writer's declared judgement, at least in the view of readers. For instances where implied likelihood is diagnosed, my arguments are along the lines that, when offered as a conclusion, "X may be so" is positively weighted, whereas "X may not be so" is negatively weighted in pragmatic terms (though not in formal logic). As already noted, however, a declaredly non-committal mention of a possible outcome will carry only a very weak and debatable implication in these terms (see discussion in section 2). Example (7) presents one such controversial instance, taken as a weak (NO) in the preliminary analysis, but certainly open to other readings:

(7) ... it may not be easy to prove he is in breach... The standard may be lower ... It all depends on the court's decision. (NO) [script 19]

Linguistic signals of probability, possibility or explicit writer opinion have been highlighted in examples (8)-(15):

(8) However, the breach of duty is **likely** to be found though the standard of care is lowered. (YES) [script 4]
(9) ....and this **may lay the ground** for Doris to **argue that** Albert was liable. (YES) [script 9]
(10) As we know, Albert was driving very fast and came to a set of traffic lights. It was **good evidence to show** that Albert was liable as he could not fulfil the duty of care owed to her because he couldn't meet the reasonable standard of care. (YES) [script 13]
(11) **But is it reasonable** to uphold that duty [= the duty to stop at a red light] in the present circumstances? Albert **may argue** that he was in a hurry or emergence and it is reasonable for him to believe there was no

car coming or no car would collide with him based on the observation and determination in that situation. (NO) [script 26]

(12) Therefore, it **may be argued** that he is not in breach of his duty. (NO) [script 12]

(13) So he **may** not have breach his duty. (NO) [script 17]

(14) Therefore, **I think** Albert had not breach the duty in terms of the standard of care of a reasonable driver acting in emergency. (NO) [script 29]

(15) Therefore, contributory negligence on Albert **may possible can't** established. (NO) [script 6]

Examples (8)-(10) are the only three cases recorded as (YES), "positive likelihood or possibility", in the preliminary analysis. Examples (11)-(15) (and (7) also) are among a total of 15 cases taken in the preliminary analysis to signal (NO), "negative likelihood or possibility".

The range of modal signalling extends beyond modal auxiliaries to include, singly or in combination, adjectives indicating probability (likely) or evaluation (good, reasonable), evaluative noun phrases (good evidence to show...), verb choices that are factive (show) or non-factive (argue), among other choices (also see full dataset). Whether an expression of opinion such as "I think" in (14) counts as a "modal" choice is debatable (Palmer, 1986 discusses modality and speaker opinion; Butt et al, 1995 take modality as the general term for all signs of speaker opinion). From a pedagogical viewpoint, there seems little reason to restrict our consideration of the signalling of speaker meaning to grammatical as opposed to lexical forms of modality (see also Stubbs, 1986). As noted earlier, the mention of "contributory negligence" in example (15) is misleading (Albert is not a potential plaintiff, in terms of the question set); this essay presented Carl as primarily responsible for the accident.

A number of the conclusions (1)-(15) display non-standard grammatical usage in English. This is obviously a matter for concern, and for appropriately judged teacher feedback to students. Extensive experience and research have shown, though, that negative feedback does not immediately bring learners' developing grammars into conformity with standard usage (see, e.g., Sharwood Smith, 1994). Even the markedly non-standard usage in (15) remains interpretable (roughly as "may not be possible to establish"). Co-occurrence of modals (*may can't) is unacceptable in English, but the usage is not "illogical" (and it is grammatically acceptable in some languages). Divergence from standard English usage in (15) is further complicated by questions of selection and formation of active or passive voice.

More important for a general appreciation of the writing, however, is to note the extent to which students are already able to convey conclusions with a selected degree of caution. Several of these conclusions exhibit growing linguistic and intellectual sophistication among these first-year undergraduate writers. The ability to convey a point of view on an issue, without either fudging matters or making unjustified assertions, takes time and experience to develop as a writer, and this capacity is already in evidence in students' answers to legal problems.

2. Other readers' judgements (applying categories used in preliminary analysis)

Table 1 presents the findings for this section.

Table 1 Categorisation of thirty conclusions (as definite, qualified or uncommitted) in preliminary analysis and in ratings of four independent judges.

Script number	Preliminary analysis	Ratings by four judges: (DC)	(DN)	(CB)	(EM)	Agree %
1	(N)	(N?)	(N)	(N)	(N)	100
2	N	N	N	N	N	100
3	(N)	(N?)	(N)	(N?)	N	75
4	(Y)	(Y)	Y	(Y)	Y	50
5	(N)	(N?)	F	(N?)	(N)	75

6	(N)	(N?)	(N?)	(N)	N	75
7	(N)	(N?)	(N)	(N?)	(N)	100
8	Y	Y	Y	Y	Y	100
9	(Y)	(Y?)	F	(Y?)	(Y?)	75
10	N	N	N	N	N	100
11	(N)	(N?)	N	(N)	(N)	75
12	(N)	(N?)	N	(N)	N	50
13	(Y)	Y	Y	(Y)	Y	25
14	Y	Y	Y	Y	Y	100
15	(N)	(N)	(N)	(N)	(N)	100
16	(N)	(N?)	(N)	(N?)	(N?)	100
17	(N)	(N?)	(N)	(N)	(N?)	100
18	Y	Y	Y	Y	Y	100
19	(N)	F	F	F	(Y?)	0
20	(N)	F	F	F	(Y?)	0
21	Y	Y	Y	Y	Y	100
22	Y	Y	(Y)	Y	Y	75
23	N	N	N	N	N	100
24	N	N	N	(N)	N	75
25	N	N	N	N	F	75
26	(N)	(N?)	F	(N)	(N?)	75
27	(N)	(N?)	(N)	(N?)	(N)	100
28	N	N	N	N	N	100
29	(N)	N	N	N	N	0
30	N	N	N	N	N	100

Key:

(DC), (DN)	:	independent judges (teachers on EEL adjunct course)
(CB), (EM)	:	independent judges (other English Centre teachers)
Agree %	:	extent of independent judges' agreement with preliminary analysis (5 categories)
Y	:	categorical YES
(Y) and (Y?)	:	qualified YES (with "?" = tentative YES)
(N) and (N?)	:	qualified NO (with "?" = tentative NO)
N	:	categorical NO
F	:	FENCE, i.e. no conclusion is offered

Of the 12 items that were identified as categorical YES (5) or NO (7) in the preliminary analysis, 9 were found to be identically categorical by all four independent judges (i.e. 100% agreement). In three cases (scripts 22, 24 and 25) there were three independent judges (75%) in agreement with the preliminary analysis and one dissenting judge (25%: a different individual in each instance).

Of the 18 items that were taken to indicate qualified support for (YES) (3) or (NO) (15) in the preliminary analysis, which did not attempt to subdivide such support in terms of "probable" versus "possible", only 6 items (scripts 1, 7, 15, 16, 17 and 27), all instances of (NO), were identically so categorised by all four independent judges. One of these items (script 17) was also technically invalid since the text given to teachers inadvertently included the symbol (NO) next to the item. Please recall that the preliminary analysis did not distinguish between probable support (YES)/(NO) and more tentative support (YES?)/(NO?). The present discussion does not consider this aspect further, but Table 1 also displays the occurrence of tentative or likely ratings by the four independent judges.

There was 75% agreement with the preliminary analysis on 6 items (scripts 3, 5, 6, 9, 11 and 26); 50% on 2 items (scripts 4 and 12); 25% on 1 item (script 13 was seen as categorical, not qualified, by three of four independent judges; the analysis may have taken insufficient account of the factive implications of "good evidence to show that" in this conclusion); 0% agreement with the analysis of 3 items (scripts 19, 20 and 29). Script 29 was judged by all four independent judges to be a categorical NO. The occurrence of "I think" in this case has been taken, by all four readers free of analytical preconceptions about the effects of explicitly marking speaker or writer opinion, as an affirmation of view, not as a hedge: compare comments on this script as example (14) above. Scripts 19 and 20 were judged to indicate "FENCE" positions by three of four independent judges, while the fourth judge (the same individual in each case) saw these cases as tentatively positive (YES?), in contrast to the qualified negative in the preliminary analysis.

Among teachers' comments on the task were that decisions on some extracts might have changed if fuller context had been given, and that teachers' knowledge of both students and subject matter was relevant to the interpretation of the data. Two teachers also independently commented that the activity had been fun to do.

The important comment on limited context is clearly a limitation on validity. This lack of context may have been more pronounced for those colleagues unfamiliar with the language of tort law. Conclusion 25, "Therefore, the breach cannot be established" had appeared as a straightforward NO to the researcher, but was noted as a difficult item by the colleague opting for FENCE. Alternative readings appear to have been (a) 'No, a breach of duty of care cannot be established in court in this case'; (b) 'I really don't know, I can't establish whether or not there was a breach of duty.' Certainly, more context would have resolved this problem for one colleague.

One could speculate further (perhaps about differences between British and other native varieties of English in the uses of modals) in seeking to account for some of the outcomes, but enough has been said to suggest the complexities of interpretation that were involved. Despite the artificially limited context for the judgement task, and the differences in knowledge of the first-year undergraduate course in tort law between the adjunct teachers and the other teachers, quite good or full agreement (75% or 100%) was achieved in the judgements of all four teachers, also coinciding with the researcher's judgements in the preliminary analysis, on most items.

3. Modal choice and consistency of extended argumentation

The importance of more extended context is again evident for the final stage of this study, which examines the appearance of inconsistency, or of outright contradiction, as some students' discussions develop in their texts. Interestingly, some of these instances were found in the course of essays that, in general, displayed a promising command both of written English and of the legal issues to be discussed.

As fairly lengthy extracts are needed to display such outcomes, only two scripts (2 and 3) are reproduced. Suspension marks show omitted text (considered not to be crucial for the current purpose). Each example is followed by a short commentary (which does not, of course, reflect the form in which spoken and written feedback was given to student writers at the time). Post hoc commentaries in such matters are, of course, highly speculative. This observation still applies when the writing has been discussed with the student writers, since retrospection and reinterpretation cannot always be neatly separated in such conferencing.

Script 2 Concerning Doris, was Albert's negligence a cause of her injury? The answer is affirmative. Similar to the case of Carl, Albert's shooting the red light is a breach of statutory duty which may well support that he broke the reasonable standard to take care of his neighbours. Moreover, he should also know that there would be accidents if he shoot the red light. However, as mentioned that he was in was emergency in which the standard of care should be lower than that of the reasonable standard; what he was thinking was reasonably to take his wife to the hospital and that at 3.a.m. with light traffic, there would rarely be traffic accidents. So he wasn't in breach of duty.

The expression "breach of duty" has been used in two different senses in one affirmative and one negative statement in the same paragraph ("...Albert's shooting the red light is a breach of statutory duty" yet "...he wasn't in breach of duty (of care)..."). The potential for perceived incoherence is evidently considerable. Matters are also complicated by the observation (above) that "breach of statutory duty" is not an obvious or suitable way to denote the illegal act of driving through red traffic lights for the purposes of this question. The underlying distinction between breaking the law (established) and breaching a duty of care (under discussion) is, nonetheless, justified in terms of the question. The notion that Albert might "reasonably" meet a standard of care "lower than that of the reasonable standard" raises other problems for text coherence, that could be resolved by a reference to "normal" circumstances. A final problem for analysis of this text is whether "So he wasn't in breach of duty" concludes the writer's own discussion, as has been assumed in the preliminary analysis, or continues a hypothetical report of what Albert was thinking (if so, implausibly, unless perhaps Albert is also a lawyer?).

Script 3 For Betty to sue Albert, Betty has to prove that Albert owed her a duty of care in the first place. A duty of care exists in this case since Albert, being a driver, owed a duty of care to his passenger, Betty, to drive reasonably safe in order to get her to the hospital (destination). Albert's negligent driving that caused injury to Betty is obviously a lack of duty of care.

Betty then has to prove that there has been a breach of the duty of care owed to her by Albert. Superficially, it seems that Albert has breached his duty of care since his negligence and recklessness in driving (i.e. drive very fast and went through red lights). Nevertheless, whether Albert has breached his duty of care heavily depends upon whether he had met the standard of care justified by the notion of reasonableness after contemplating the circumstances concerned. It had been an emergency situation ... Thus the judge may be satisfied that it is reasonable for Albert to drive that fast ... and that Albert may not breach the duty of care.

Taken out of context, the sentence "Albert's negligent driving that caused injury to Betty is obviously a lack of duty of care" would read as a categorical conclusion that a duty of care not only exists but has also been breached. In context, however, the sentence precedes a discussion of breach which proves careful and circumspect, and which tentatively concludes in Albert's favour ("Superficially, it seems that"... "Nevertheless... heavily depends upon whether".... "Thus the judge may be satisfied... that Albert may not..."). The earlier comment ends a paragraph establishing the (fairly evident) point that "Albert, being a driver, owed a duty of care to his passenger, Betty". The writer's intention could therefore have been to suggest that any act of negligent driving by Albert that caused injury to Betty would obviously count as a lack (= breach) of a duty of care (i.e. not as an act of negligence in circumstances where no duty of care was owed). The effect of the text at this point, however, is to suggest actual rather than hypothetical breach. Various revisions might be suggested, but omission of the sentence is probably simplest and surest.

A more general point arising from these commentaries is to suggest that inconsistencies in the wording of arguments do not necessarily reflect any underlying intellectual confusion over content or writer's viewpoint (though of course they sometimes do so). A useful role for teacher feedback, ideally including opportunities for one-to-one conferencing to discuss a student's writing and the comments of teacher and peers, could be to convey to students how the wording of their texts at such points is likely to be understood by other (academic) readers, and to suggest how changes might be made to the text to help readers follow a line of argument

intended by the writer. Under time pressure, nonetheless, inconsistencies in the wording of complex argumentation are easily perpetrated in the course of student essays and in other discourses.

Implications

The main implication of this exploratory study is to suggest that the academic writing produced by our students is an object worthy of attention and respect. Although this is a self-evident truth in some ESL circles, long-established messages within the profession about the status of learner language face continuing scepticism outside our own ranks. Although teachers (myself included) also tend to be preoccupied with problems and perceived shortcomings, we need to reinforce the message to others that it is not reasonable to expect ESL students to write English as though they were English L1 students. Many English L1 users would in any case have a hard time deciding what weight to give to a conclusion on a point of law, and how to convey that conclusion clearly and effectively, under the acute time constraints of an examination-style written answer. Combining these two comments, we should invite all concerned to recognise that the writing produced by these ESL students under timed conditions in an adjunct class constitutes a considerable achievement. (For interesting comments on the status of second language performance, see Cook, 1991.) It is similarly apparent that first-year undergraduate writers will have some way to go before they master the specific register of legal English (see, e.g., Bhatia 1993); again, it is important to examine samples of students' writing on their own terms, and not solely by comparison with other writer populations.

In what ways might teachers provide constructive linguistic advice on areas for further development in students' writing? In the present case, students had earlier received explicit instruction on ways to introduce a legal issue into their writing (e.g. the issue here is whether...). Many students, however, still appear to avoid constructions of this kind in their own writing, perhaps especially under pressure of time. One reason may be that "indirect questions" are difficult to produce correctly, as attested by observed misuses such as "...is that whether..." Direct questions are easier ("Is Albert in breach of duty?") and are fairly widely used (as exemplified in Script 2, and at the start of the present paragraph), but some students and many teachers may find frequent use of these forms unsophisticated and try to avoid their repeated occurrence in formal writing. Besides encouraging students to persevere with the use of "indirect question" constructions, teachers can suggest a range of other wordings, such as "apparently" ("...is apparently breach of his duty..." occurs in the present dataset), "it may at first appear that", or judicious uses of the legal expression "prima facie", in order to help students introduce possibilities for consideration into their discourse.

Apart from overt comment by teacher or peers, students are likely to become more aware of the need for careful wording as they introduce possibilities into their texts through the subsequent experience of reading, and being asked to make written comments upon, the often very different answers that other students have given to the same legal problem. Knowing that their comments will be read, not only by the original writer, but by the ESL teacher, will encourage most students to take this task seriously. At best, the levels of careful statement and background knowledge that appear in students' written comments (e.g., on the EEL course, suggesting what other legal authorities might have been used in an answer) show conclusively that these students' written feedback to their peers has not been appropriated by the ESL teacher, and at times goes beyond what the ESL teacher would have been able to observe. This last claim, however, takes us beyond the confines of the present study.

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Appendix

Dataset for the study.

The dataset of thirty extracted "conclusions" to the legal point at issue is presented below, together with the text of the request to colleagues for assistance in the second stage of the research. (The text below omits the fact situation which appears in the article).

Request for assistance (research).

I would be very grateful if you could spend a little time (I hope not more than 30 minutes) to read quickly through the following extracts from a legal assignment and to place each extract into one of the seven categories that I outline below. The purpose is to help me validate the categories used in a preliminary analysis of the students' essays, as well as to see how transparent the content of the essays proves to be to other English teachers.

If you can help, please do not agonise over the process. The issue that concerns me is to determine what conclusions each student has drawn in the essay on just one single aspect of the question, namely:

- Did Albert (the driver of a car that was involved in an accident) breach a duty of care owed to his passenger (Betty) or to the passenger in another car (Doris)?

The full fact situation is set out in the assignment question.

The basic answers to the question are YES (he did breach duty of care) or NO (he didn't). The reason that I use seven categories, rather than three including "FENCE" for sitting on the fence, concerns degrees of definiteness or probability. The categories I would like you to use are therefore:

Category code	Interpretation of category code
Y	The student states that A. was in breach of (= breached) duty of care
(Y)	The student indicates (the view) that A. was probably in breach of duty
(Y?)	The student indicates that A. was possibly in breach of duty
FENCE	The conclusion remains unclear or indeterminate in weighting
(N?)	The student indicates that A. was possibly NOT in breach of duty
(N)	The student indicates (the view) that A. was probably NOT in breach of duty
N	The student states that A. was NOT in breach of duty

Please note clearly your choice of category alongside each of the 30 extracts. Any additional information you would like to give, e.g. about difficulty in reaching a decision on some items, will also be most welcome. Thank you for your help.

FACT situation: [Omitted in this appendix: please see text of article]

Conclusions reached in the essays:

(1) In this case, probably any reasonable person would consider driving fast and breaking the traffic regulation not a serious offence if by doing so she or he could save somebody's life. Betty was very ill

and the chance for her to be cured on time was dependant upon how fast Albert could get her to the hospital. Furthermore, given the time at 3 a.m. and "there was very little traffic around", the circumstances in a way allowed Albert to drive fast.

(2) So he wasn't in breach of duty.

(3) Thus the judge may be satisfied that it is reasonable for Albert to drive that fast in order to get his wife (a person who has a love and affectionate relationship with the Defendant) to hospital and that Albert may not breach the duty of care.

(4) However, the breach of duty is likely to be found though the standard of care is lowered. Because in this case, Albert has actually went straight through the red traffic lights and this is obviously a breach of duty of a standard driver to obey the rule. So, albert can also be sued on the ground of breaching of the traffic ordinance.

(5) Thus Betty might not succeed if she sue her husband. Albert may pleaded not guilty in negligence. Actually the judge may incline on that judgement because of policy reason. Albert want to save Betty so he break the law. The judge may give sympathy to such intention and feel very furious to Betty's cruel charges. He also may not (way?) to open a precedent which may deter people from saving others.

(6) Therefore, contributory negligence on Albert may possible can't established.
[by Carl, the other driver]

(7) Therefore, Albert may not be held liable ... As we are not certain whether Albert has breached his duty ...

(8) Moreover, it was obvious that both Albert and Carl had breached their duty of care.

(9) ... and this may lay the ground for Doris to argue that Albert was liable.

(10) To conclude, due to in emergency situation and not likelihood of accident, Albert is not in breach.

(11) By doing so, he did not act carelessly but has weight the possibility of a collision (Stone and Bolton showed that if the event is unlikely to happen, the person is not in breach). Therefore, Betty may not easy get a remedy from Albert under the circumstances.

(12) Therefore, it may be argued that he is not in breach of his duty.

(13) As we know, Albert was driving very fast and came to a set of traffic lights. It was good evidence to show that Albert was liable as he could not fulfil the duty of care owed to her because he couldn't meet the reasonable standard of care.

(14) Albert has therefore breach his duty to both parties.

(15) But did Albert reach the standard of care that he should maintain. Usually, the standard of care of a Reasonable Man should be followed (Glasgow v Muir), but in this case Albert should reach the standard of care of a reasonable driver to drive with great care. But his wife was very ill at that time, Albert was put into an emergency situation which lowers the standard of care. Also, the accident happened at 3 a.m., thus the likelihood of occurrence of the accident is low (Bolton v Stone). Thus it is justifiable for Albert to drive a bit faster.

(16) Whether Albert has breached the duty, it depends on the actual circumstances. The time when the accident occurs is already 3 a.m. (midnight) and Albert is driving fast simply because he wanted to take his sick wife to the hospital as soon as possible. The standard of care required may be relaxed in this emergence.

(17) So he may not have breach his duty ..... (No).

(18) Then, Albert and Carl did not do what a reasonable man will do in driving, therefore, they are breach their duty.

(19) In this case, however, it may not be easy to prove he is in breach ... The standard may be lower ... It all depends on the court's decision.

(20) Therefore, if it is proved, he did asses the likelihood of occurrence of the accident, the court may take a less rigid approach in finding he "breaches his duty".

(21) Unequivocally, a breach of duty by Albert could so be proved.

(22) But he still breach the standard since he drove through the set of traffic light which indicated red at that time. Therefore he could not meet the standard required of a reasonable driver.

(23) ..., therefore Albert is not in breach.

(24) I don't think Albert has breached that duty since it is highly possible that a reasonable man under emergency would perform the same act ... As there is no breach by Albert of that duty, that means Albert won't be liable if sued.

(25) Therefore, the breach cannot be established.

(26) It is imposed a duty on drivers to stop in front of red light by driving regulations. It is obvious that Albert breach this duty. But is it reasonable to uphold that duty in the present circumstances? Albert may argue that he was in a hurry or emergence and it is reasonable for him to believe that there was no car coming or no car would collide with him based on the observation and determination in that situation. It was 3 a.m., there was very little traffic.
[END OF PARAGRAPH]

(27) In case of emergency, such as case of Albert, the required standard of care is relatively low such as case of Parkinson v Liverpool Corporation [1950...] Besides, when the accident happened, it was at 3 a.m. and there was very little traffic, thus, the likelihood of accident is low. If Albert was not in breach, the causation factor can't be established since causation must be coincide with breach of duty.

(28) However, Albert did not breach the duty as [REASONS].

(29) Therefore, I think Albert had not breach the duty in terms of the standard of care of a reasonable driver acting in emergency.

(30) Therefore, since the standard of care in emergency, according to Jones v Boyce, Albert was not in breach. Negligence cannot be proved.

[Author's note: the inclusion of (NO) in 17, resulting from a proof-reading error, technically invalidated the item.]